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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ROBERT DELL McGILBERRY, Defendant and Appellant.	A105384 (Alameda County Super. Ct. No. H34966)

A jury found appellant Robert Dell McGilberry guilty of grand theft. (Pen. Code,[1] § 487, subd. (a).) Appellant admitted a prior strike allegation (§§ 1170.12, subd. (c)(1), 667, subd. (e)(1)) and five state prison priors (§ 667.5, subd. (b)).[2] He was sentenced to the aggravated term of three years for the grand theft, doubled under the "Three Strikes" law, plus five one-year terms for the state prison priors. The total aggregate sentence was 11 years in state prison.

Appellant raises a single sentencing issue on appeal. He contends that the imposition of the aggravated term of three years on his grand theft conviction violated *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*).) Finding any *Blakely* error to be harmless, we affirm the judgment and sentence.

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[1] All section references are to the Penal Code.

[2] Two other state prison priors were found true by the trial court, but the court did not enhance the sentence.

DISCUSSION

In *Blakely*, the United States Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt, or admitted by the defendant. (*Blakely, supra,* 542 U.S. at p. ___ [124 S.Ct. at p. 2536].) Whether *Blakely* precludes a trial court from making findings on aggravating facts in support of an aggravated or upper term sentence under the California determinate sentencing law is currently under review by our California Supreme Court. (See *People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.) For purposes of this case, we will assume that *Blakely* applies to the California sentencing scheme.[3] However, we conclude that *Blakely* affords no relief to appellant herein.

In imposing the aggravated term, the trial court stated: "In evaluating what term of prison defendant should receive, the Court first considers [California Rules of Court,] Rule 421 and any circumstances in aggravation. [¶] Under 421 (a) (8), the Court finds that the matter in which the crime occurred, while certainly unsophisticated, does reflect some planning and intent. His comments here in court suggest that, as well. [¶] Under 421 (b) (1), the defendant's past criminal history, although old, does reflect acts of violence which suggest that he may continue to be a threat to society. The Court does not give great weight to that particular assessment, however. [¶] In 421 (b) (2), the Court notes the defendant's prior criminal convictions are numerous. He may be appropriately classed as a career criminal, having at least eight prior felony convictions over the past 25 years. [¶] Subsection (b) (3) requires the Court to consider the fact that the defendant has suffered seven previous prison terms. [¶] Perhaps it's only six. [¶] Under (b) (5), the defendant's

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[3] *United States v. Booker* (Jan. 12, 2005, Nos. 04-104 & 04-105) ___U.S. ___ [2005 WL 50108] may have cast further doubt on that assumption given the discretionary nature of our sentencing scheme.

performance on probation and parole are noted as having been unsatisfactory. [¶] And under (b) (7), prior to his comments today the defendant has heretofore not expressed remorse. And as far as his report to the probation officer, he offers justification rather than remorse, responsibility, or guilt. [¶] Turning to Rule 423, considering aspects in mitigation, the Court notes under (a) (8) that little credit is attached to the probation officer's assertion under Rule 412 and the Defense counsel's similar assertion that the theft was an attempt to provide for the necessities of life for defendant's family and himself. While he did take about $70 worth of diapers, the rest of the [$473] theft was for liquor, candy, assorted nuts, and assorted steaks. The defendant further stole $167 worth of non-nutritional Kool-Aid. [¶] Looking at (b) (3), the Court takes exception to the probation officer's finding that the defendant voluntarily acknowledged wrongdoing at an early stage. In point of fact, Mr. McGilberry denied guilt to the very end and went to jury trial. [¶] Even subsequent to his conviction, his position heretofore was that his girlfriend was responsible for misappropriating community funds for substance abuse, and that he was stealing solely to bring home food for his infant and family, doing, in essence, what a man has to do. [¶] Mr. McGilberry has previously denied wrongdoing from beginning to end. He has modified that position somewhat this morning by indicating that it was he that had used the community funds for substance abuse as opposed to the mother of the child. [¶] The exposure defendant faces in the Health and Safety Code Section 11379 (a) charge (sic) is sixteen months, two years, or three years in the state prison. He has served several state prison priors."

The aggravating factors cited by the trial court to which *Blakely* would arguably apply include the fact that the crime involved planning; that appellant may pose a threat to society; and that he has failed to show remorse. The aggravating factors that are excepted from application of *Blakely* because they are facts relating to prior convictions and recidivism include appellant's numerous prior convictions; convictions that resulted in his serving state prison terms; and his prior unsatisfactory

performance on probation and parole. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Almendarez-Torres v. United States* (1998) 523 U.S. 224.)

With respect to mitigating factors, the trial court gave no weight to the early admission of guilt factor and little weight to the "necessities of life" factor as an explanation for the theft.

It is well settled that a single factor in aggravation is sufficient to support imposition of an upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) Further, "[w]hen a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492.)

Considering these aggravating factors to which *Blakely* does not apply, and were properly relied upon, including appellant's numerous felony convictions and prior prison terms, it is not reasonably probably that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper under *Blakely*.

Judgment affirmed.

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Reardon, Acting P.J.

We concur:

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Sepulveda, J.

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Rivera, J.